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The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards

COMMENT

THE EROSION OF THE STANDING IMPEDIMENT IN CHALLENGES BY DISAPPOINTED BIDDERS OF FEDERAL GOVERNMENT CONTRACT AWARDS

I. INTRODUCTION

The federal government, at the present time, seems anxious to broaden the scope of its discretionary authority in awarding government contracts in order to avoid cost overruns[1] and to alter the patterns of racial discrimination[2] and regional unemployment.[3] However, the federal courts have embarked upon a course which will probably lead to closer judicial scrutiny of the discretionary powers of federal administrative agencies with respect to the award of federal government contracts. Formerly without standing to challenge the award of a government contract to a competing bidder,[4] prospective contractors, by virtue of several recent federal court decisions,[5] may now find it easier to gain a judicial hearing on their contention that the government's action in awarding a contract was an abuse of administrative discretion.

II. COMPETITIVE BIDDING FOR GOVERNMENT CONTRACTS

Since the first federal statute requiring advertising for bids prior to the award of government contracts was passed in 1809,[6] competitive bidding has become

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1. See N.Y. Times, June 10, 1970 at 1, col. 2; N.Y. Times, July 28, 1970, at 1, col. 6.

2. See Remmert, Executive Order 11,246: Executive Encroachment, 55 A.B.A.J. 1037 (1969); Note, Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U.L. Rev. 590 (1969). See also Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970) for a recent decision concerning the current Administration's controversial "Philadelphia Plan" which is based on Exec. Order No. 11,246, 3 C.F.R. 339 (Supp. 1965). The purpose of the plan is to combat discrimination in the construction industry. Branches of the federal government have also become involved with programs to assist minority contractors in preparing bids for federal construction projects. See N.Y. Times, July 21, 1970, at 25, col. 6.

3. This idea has not only been promoted in recent months. See Miller, Observations on the Consistency of Federal Government Procurement Policies With Other Government Policies, 29 Law & Contemp. Prob. 277, 300-06 (1964). See generally N.Y. Times, July 9, 1970, at 1, col. 6.

4. The basic reasoning has been that statutes which regulate federal government procedures were enacted solely for the benefit of the government and confer no enforceable rights upon persons dealing with it. The leading case in the Government contracts field espousing this reasoning is Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). In his Administrative Law Treatise, Professor Davis contends that the Perkins decision was legislatively reversed by the 1952 Fulbright Amendment to the Walsh-Healy Public Contracts Act, 66 Stat. 308 (codified at 41 U.S.C. § 43(a) (1964)). See 3 K. Davis, Administrative Law Treatise 220 (1958).

5. See notes 108-62 infra and accompanying text.

6. 2 Stat. 535-37 (1809).

the cornerstone of federal procurement policy.[7] Today, federal government contracts are awarded either by means of formal advertising—that is, by competitive bidding[8]—or by negotiation.[9] The greatest number of procurements, however, are awarded by the former method,[10] and the federal statutes relating to government procurement[11] indicate that Congress prefers competitive bidding, since procurement by negotiation is only permitted as an exception to the general policy of formal advertising for bids.[12] State[13] and local[14] governments also prefer to award contracts on the basis of competitive bidding.

Federal statutes regulating bidding procedures provide that the award of the contract shall be made to "that responsible bidder whose bid . . . will be most advantageous to the Government, price and other factors considered . . . ."[15] State statutes likewise speak of "lowest responsible bidder,"[16] "lowest and best bidder,"[17] "lowest responsible and qualified bidder,"[18] or "lowest responsible and eligible general bidder."[19] By using the word "responsible" or its equivalent, Congress and the state legislatures have converted the task of the contracting officer or agency from one of mechanically selecting the low bid to one involving an "irreducible minimum of discretion"[20]—that is, selecting the lowest *responsible* bidder.[21] However, a disappointed bidder might disagree with an agency award to a competitor who had been found to be responsible, and so litigation was inevitable.

III. The Standing Issue

A. *General Background*

In deciding the issue of standing the court focuses upon the parties and determines whether they should be permitted to seek an adjudication of a

7. See United States v. Warne, 190 F. Supp. 645, 655 (N.D. Cal. 1960), modified sub nom. Paul v. United States, 371 U.S. 245 (1963).

8. See J. Paul, United States Government Contracts & Subcontracts 145-62 (1964).

9. Id. at 163-91.

10. Id. at 163. The author points out, however, that procurement by negotiation accounts for more spending dollarwise than does procurement by formal advertising.

11. 10 U.S.C. § 2303 (1964); 41 U.S.C. § 253 (1964).

12. 10 U.S.C. § 2304 (1964); 41 U.S.C. § 252(c) (1964).

13. E.g., 127 Ill. Ann. Stat. ch. 127, § 132.2 (Smith-Hurd 1967).

14. E.g., New York, N.Y., Charter § 343.

15. 41 U.S.C. § 253(b) (1964).

16. E.g., Ala. Code tit. 37, § 468 (1959); Ark. Const. art. 19, §§ 15-16; Del. Code Ann. tit. 17, § 305 (1953); Ill. Ann. Stat. ch. 127, § 132.6 (Smith-Hurd Supp. 1970); La. Rev. Stat. Ann. § 38:2211 (1968); N.J. Stat. Ann. § 40:50-1 (1967); N.Y. Gen. Munic. Law § 103(1) (1965); Okla. Stat. Ann. tit. 61, § 36 (1963); W. Va. Const. art. VI, § 34.

17. E.g., Ind. Ann. Stat. § 36-112 (Supp. 1970); Ohio Rev. Code § 735.05 (Page Supp. 1969).

18. Conn. Gen. Stat. Rev. § 4-114 (1969).

19. Mass. Ann. Laws ch. 149, § 44A (Supp. 1969).

20. 44 Yale L.J. 149, 150 (1934).

21. See Comment, Rights of the Unsuccessful Low Bidder on Government Contracts, 15 W. Res. L. Rev. 208 (1963).

particular issue.[22] Depending upon whether the action is brought in the general public interest or a particular private interest, the plaintiff derives his standing from his status as a citizen, or taxpayer, or from his own legal right that has been infringed by the defendant.[23] Standing is merely one of several factors[24] which the court must consider in determining the reviewability of a particular issue.[25]

The Supreme Court once termed the law of standing a "complicated specialty of federal jurisdiction."[26] Although this statement is inaccurate since standing is a jurisdictional issue for all courts both state and federal to decide,[27] it is true that in suits against the Government and its agencies the federal courts have created a morass of rules relating to standing and now find it impossible to achieve consistency.[28] Most state courts, on the other hand, have dispensed with artificial standing rules and generally grant standing[29] to any party who has in fact suffered injury as a result of agency action.[30] This "injury in fact" doctrine,[31] which has greatly simplified the standing issue in state courts, has

22. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

23. See, e.g., Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961); Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255 (1961).

24. Several of the others are ripeness, see, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 148-56 (1967); L. Jaffe, Judicial Control of Administrative Action 395-423 (1965); exhaustion of administrative remedies, see id. at 424-58; 3 K. Davis, supra note 4, at 56-115, and the sovereign immunity doctrine, see e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); United States ex rel. Goldberg v. Daniels, 231 U.S. 218 (1913); Jaffe, supra at 222-31. See generally Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

25. See Saferstein, supra note 24, at 367.

26. United States ex rel. Chapman v. FPC, 345 U.S. 153, 156 (1953). One federal court recently observed that courts have often had to perform "mental gymnastics" in deciding standing issues. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970).

27. See 3 K. Davis, supra note 4, at 210.

28. Id. at 291-92.

29. It may seem peculiar to use the phrase "granting standing" since standing doesn't seem to be something which the court gives but which it either finds to exist or not exist. The real issue, however, is more complex (see Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255, 256 (1961)) and it is sufficient to say that, though the phrase is technically incorrect, even a court which is very liberal in "finding" that a plaintiff has standing uses it. See Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869, 872 (D.C. Cir. 1970). The fact that the courts have used this kind of language may indicate that they have erected a standing barrier to deny judicial review when there are policy reasons which make them wary of hearing the merits. See generally 44 Yale L.J. 149, 151-52 (1934). See also notes 69-75 infra and accompanying text.

30. 3 K. Davis, supra note 4, at 291-92.

31. The federal courts have traditionally required one to have suffered injury to a legal right in order to gain standing. In Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923), the Court required the plaintiffs to show that "the order alleged to be

unfortunately[32] not been completely accepted in the federal courts so that the federal law of standing has retained its complexity.[33] Many early federal decisions denying standing have been modified or overruled in recent years,[34] however, and the federal courts appear to be moving toward acceptance of the "injury in fact" doctrine.[35] Several recent decisions tend to substantiate this trend.[36]

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void subjects them to legal injury, actual or threatened." Id. at 148. That the plaintiff was injured in fact was not sufficient. In Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939) the Court defined a legal right as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Id. at 137-38 (footnote omitted). Professor Davis finds this statement absurd, saying that if it represented what the law actually was, "no one could challenge a statute outlawing the Baptist Church, or prohibiting Republican speeches, or denying criminal defendants a jury trial, or authorizing unlawful searches, or compelling witnesses to testify against themselves." 3 K. Davis, supra note 4, at 218.

32. While the federal courts have to some extent modified the legal right approach to the standing issue (see note 33 infra) Professor Davis argues that the problem will only be solved by granting standing in reviewable actions to anyone who is adversely affected in fact by governmental action. See 3 K. Davis, supra note 4, at 291; cf. L. Jaffe, supra note 24, at 530.

33. It is not the purpose of this comment to describe in detail the entire history of the federal rule on standing to challenge administrative actions. The rule has gradually evolved over the years and other doctrines have been grafted on to the doctrine of legal right. With the case of FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) the "person aggrieved" doctrine was added. See 3 K. Davis, supra note 4, at 220. See also Judge Tamm's discussion of the development of standing in the federal courts in Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 862-65 (D.C. Cir. 1970). The Sanders court held that Congress could statutorily authorize—in the Sanders case under the Communications Act Of 1934—suits by parties injured in fact by agency action. An outgrowth of the Sanders doctrine was the idea first expressed in Associated Indus., Inc. v. Ickes, 134 F.2d 694, 702 (2d Cir.) vacated per curiam as moot, 320 U.S. 707 (1943) that Congress could authorize private parties aggrieved by agency action to bring suit in the public interest—as Private Attorney Generals. See 3 K. Davis, supra note 4, at 223-26. For a thorough discussion of the entire concept of standing in suits against the government and its agencies, see 3 K. Davis, supra note 4, at 208-94; L. Jaffe, supra note 24, at 459-545. See also, Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816 (1969); Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255 (1961); Comment, Standing to Challenge Administrative Agency Conduct—Recent Developments in the Federal Common Law, 44 Tul. L. Rev. 95 (1969).

34. Compare, e.g., Frothingham v. Mellon, 262 U.S. 447 (1923) with Flast v. Cohen, 392 U.S. 83 (1968); and Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939) with Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968).

35. See 3 K. Davis, supra note 4, at 78 (Supp. 1965).

36. See, e.g., Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Ballerina Pen Co. v. Kunzig, No. 22,799 (D.C. Cir., April 24, 1970). For a thorough discussion of the impact of the Data Processing and Barlow cases cited above and their impact upon the law of standing in general, see Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970).

B. *The Bidder's Standing*

While the state courts have no uniform approach to the issue of a bidder's standing to judicially challenge the award of a public contract to a competitor,[37] the federal courts have consistently denied a bidder judicial review. Federal statutes regulating bidding procedures require that government contracts be awarded to the responsible bidder whose bid is the most advantageous to the government.[38] The federal courts have relied upon this requirement in concluding that the government agency has broad discretion in deciding which bid is the most advantageous.[39] It has long been recognized that a federal government officer's exercise of discretion granted him by statute is not subject to judicial review.[40] Thus, when a bidder sues to challenge an agency's award to a competing bidder, one of the bases for a federal court's finding that the issue is not reviewable is that it is within the discretion of the government agency.[41]

37. A detailed study of the states' approach to the issue of a bidder's standing to sue is beyond the scope of this comment. It can be said, however, that generally the state courts are more likely to find that a bidder has standing than are the federal courts. This is consistent with the more lenient state approach to the standing issue in general. See note 30 supra and accompanying text. Some states hold that a bidder who alleges sufficient wrongdoing has standing. See, e.g., Brown v. City of Phoenix, 77 Ariz. 368, 272 P.2d 358 (1954); St. Landry Lumber Co. v. Town of Bunkie, 155 La. 892, 99 So. 687 (1924); Paterson Contracting Co. v. City of Hackensack, 99 N.J.L. 260, 122 A. 741 (1923); State ex rel. United Dist. Heating, Inc. v. State Office Bldg. Comm'n, 124 Ohio St. 413, 179 N.E. 138 (1931). (It is interesting to note at this point that a federal court found that under controlling Louisiana law the state had a public interest in securing honest competition and in protecting its taxpayers from the evils of favoritism and inflated prices resulting from inefficient dishonest procurement of contracts for public works. Housing Authority v. Pittman Const. Co., 264 F.2d 695, 697 (5th Cir. 1959).) Other states allow a bidder to sue provided that he is a taxpayer suing in the public interest. See, e.g., Malan Const. Corp. v. Board of County Road Comm'rs, 187 F. Supp. 937 (E.D. Mich. 1960) (decided under Michigan law); Inn Operations, Inc. v. River Hills Motor Inn Co., 152 N.W.2d 808 (Iowa 1967); State ex rel. Johnson v. Sevier, 339 Mo. 483, 98 S.W.2d 677 (1936); Day v. City of Beatrice, 169 Neb. 858, 101 N.W.2d 481 (1960). See also 43 C.J.S. Injunctions § 120 (1945).

38. E.g., 41 U.S.C. § 253(b) (1964) relating to procurement procedures provides: "Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . . ."

39. E.g., Friend v. Lee, 221 F.2d 96, 100 (D.C. Cir. 1955) where the court said: "[A]dvantage is not measured exclusively in terms of price; it includes other factors such as judgment, skill, ability, capacity and integrity." See also United States Wood Preserving Co. v. Sundmaker, 186 F. 678, 683 (6th Cir. 1911); O'Brien v. Carney, 6 F. Supp. 761, 762 (D. Mass. 1934).

40. See, e.g., Louisiana v. McAdoo, 234 U.S. 627 (1914); United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); United States ex rel. Dunlap v. Black, 128 U.S. 40 (1888); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

41. See, e.g., Clement Martin, Inc. v. Dick Corp., 97 F. Supp. 961, 964 (W.D. Pa. 1951) where the Court said: "The Hospital Survey and Constructions Act and the Regulations of the Surgeon General promulgated thereunder were enacted for the benefit of the people and the government and not for the benefit of prospective bidders." See also notes 61-64 infra.

The issue then becomes whether or not the agency has acted within the scope of its discretion. It is extremely difficult to delineate the discretion of a government agency.[42] The federal courts have circumvented the issue of abuse of agency discretion[43] on the theory that a bidder has no legal right violated by the rejection of his bid and therefore has no standing to sue.[44] Lack of standing, while

42. An abuse of discretion has been defined as "a clear error of judgment in the conclusion . . . reached upon a weighing of the relevant factors." McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961). Yet what factors are relevant is difficult for a court to determine when it is discussing what may be highly specialized matters. Thus, even when a bidder makes allegations tending to show that the government agency has abused its discretionary authority in awarding a contract to a competitor, courts have been reluctant to review his contentions. See Royal Sundries Corp. v. United States, 111 F. Supp. 136 (E.D.N.Y.), amended complaint dismissed, 112 F. Supp. 244 (E.D.N.Y. 1953). See generally L. Jaffe, supra note 24, at 181-84, 586-87; Saferstein, supra note 24.

43. In the case of Royal Sundries Corp. v. United States, 111 F. Supp. 136 (E.D.N.Y.), amended complaint dismissed, 112 F. Supp. 244 (E.D.N.Y. 1953) the plaintiff alleged that his low bid was rejected " 'without any consideration or evaluation thereof with that of the other bidders upon the same and equal terms as required by law;' that plaintiff's bid was declined because of the use of standards not required by the specifications, nor exacted of competing bidders; that defendants conducted no tests nor did they make an analysis of plaintiff's tendered products (arch supports) which were manufactured for military use and conformed to standard specifications; that all of this was done to favor two higher bidders . . . ." 112 F. Supp. at 244. This allegation if true would certainly constitute an abuse of agency discretion yet the court found the allegation insufficient to give the plaintiff standing. While finding that "there is implicit in the invitation to bid . . . an undertaking of good faith on the part of the agency" the court found that since "entire freedom of action in making that decision is necessarily inherent in the purchasing function, it is equally clear that allegations such as those presented in the amended pleading, if assumed to be true for present purposes, still fall short of spelling out the breach of contract rights." Id. at 245. The phrase "entire freedom of action" does not seem far removed from entire freedom from judicial review. The court seemed to be giving the agency absolute discretion. Usually the courts have not gone as far as the Royal Sundries court did in granting the agencies such freedom. If confronted with an allegation similar to the one in Royal Sundries the courts have usually dismissed the case on the grounds that the bidder had no right violated by agency action in abuse of discretion granted it by statute or regulation since such statute or regulation was not promulgated for the bidder's benefit, but for the benefit of the government. This is what the court in Royal Sundries meant when it said that the plaintiff had failed to show a "breach of contract rights." Without a breach of some legal right the plaintiff lacked standing. See notes 31-36 supra and accompanying text. See also 44 Yale L.J. at 151 where the author comments: "If discretion has been exercised the courts are reluctant to pass upon the quality of that discretion."

44. For a discussion of the "legal right" doctrine, see notes 31-33 supra. This theory was expanded long before the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (discussed notes 49-61 infra and accompanying text) adopted it. See, e.g., United States Wood Preserving Co. v. Sundmaker, 186 F. 678, 682-83 (6th Cir. 1911) where the court stated: "Laws which provide that public contracts shall be made with the lowest and best bidders . . . are enacted for the benefit of property holders and taxpayers and not for the benefit of or to enrich bidders, and are to be executed with sole reference to the public interest." Id. at 682-83.

not the only reason used by the courts in refusing to entertain the suit of a disgruntled bidder,[45] has come to be the doctrine most relied on as a basis for the dismissal of a bidder's petition for relief.[46]

IV. The Federal Rule

A. *Development*

One of the earliest cases involving the standing of a bidder to sue for the award of a contract was *Strong v. United States*,[47] decided in 1870. In *Strong* the quartermaster general advertised for bids to furnish head blocks for soldiers' graves in national cemeteries. Although the Government had reserved the right to reject all bids, the Secretary of War had neither accepted nor rejected any bids when the claimants, the lowest bidders, brought suit. The court held that since no contracts existed between the Government and the claimants, the claimants had no cause of action against the Government.

Seventy years after the *Strong* decision,[48] the Supreme Court in *Perkins v. Lukens Steel Co.*,[49] handed down what has since become the leading case holding that a competitive bidder has no standing to sue. In *Perkins*, the respondent steel companies had alleged that the Secretary of Labor arbitrarily and erroneously[50] required them to pay a minimum wage so high as to prohibit their successful bidding for government contracts. Citing *Strong* and other lower federal court decisions,[51] the Supreme Court, in reversing the court of appeals ruling in favor of the steel companies, found that: "Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."[52] The Court found that no legal rights of the steel companies had been violated[53] since:

45. See United States ex rel. Goldberg v. Daniels, 231 U.S. 218 (1913) where the highest bidder for a navy vessel sued to compel delivery. The suit was dismissed under the doctrine of sovereign immunity.

46. In the great majority of cases decided after 1900 dealing with a bidder's challenge to the award of a government contract, the reason given for the court's refusal to review was the bidder's lack of standing. See, e.g., Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967); United States v. Gray Line Water Tours, 311 F.2d 779 (4th Cir. 1962); Walter P. Villere Co. v. Blinn, 156 F.2d 914 (5th Cir. 1946); United States Wood Preserving Co. v. Sundmaker, 186 F. 678 (6th Cir. 1911); Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968); Robert Hawthorne, Inc. v. United States, 160 F. Supp. 417 (E.D. Pa. 1958); Royal Sundries Corp. v. United States, 111 F. Supp. 136, amended complaint dismissed, 112 F. Supp. 244 (E.D.N.Y. 1953); Clement Martin, Inc. v. Dick Corp., 97 F. Supp. 961 (W.D. Pa. 1951); O'Brien v. Carney, 6 F. Supp. 761 (D. Mass. 1934).

47. 6 Ct. Cl. 135 (1870).

48. There were, of course, decisions in the intervening period which denied a bidder standing. See, e.g., United States Wood Preserving Co. v. Sundmaker, 186 F. 678 (6th Cir. 1911); Colorado Paving Co. v. Murphy, 78 F. 28 (8th Cir.), appeal dismissed, 166 U.S. 719 (1897); O'Brien v. Carney, 6 F. Supp. 761 (D. Mass. 1934).

49. 310 U.S. 113 (1940).

50. Id. at 119-20.

51. Id. at 126.

52. Id. at 125.

53. Id.

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principal of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.[54]

The *Perkins* reasoning was widely followed in cases denying a bidder standing to challenge an agency contract award.[55] One writer contended that the *Perkins* decision was legislatively reversed[56] by the Fulbright Amendment[57] to the Walsh-Healy Public Contracts Act.[58] This amendment provided that all wage determinations made under the act are subject to judicial review. Thus, while it may be said that *Perkins* is no longer valid on its facts, the Fulbright Amendment did not overturn the underlying rationale of the decision,[59] and therefore cases decided subsequent to the enactment of that legislation continued to follow the *Perkins* reasoning.[60]

B. *Rationale*

The legal foundation for depriving the bidder of standing was laid in several Supreme Court cases which held that government regulations concerning contracts made between the government and private parties were for the benefit of the government and not for the benefit of those dealing with it.[61] From

54. Id. at 127.

55. See, e.g., United States v. Gray Line Water Tours, 311 F.2d 779 (4th Cir. 1962); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Walter P. Villere Co. v. Blinn, 156 F.2d 914 (5th Cir. 1946).

56. 3 K. Davis, supra note 4, at 220.

57. 41 U.S.C. § 43(a) (1964).

58. 41 U.S.C. §§ 35-45 (1964).

59. The rationale of the Perkins decision is that a legal right is a prerequisite to standing to challenge government action. This basic theory is not undermined by the Fulbright Amendment which gives standing to challenge wage determinations and related matters arising under §§ 35-45 of the Public Contracts Act. Therefore, outside of the area of wage determinations, the reasoning of the Perkins case was still valid after the passage of the Fulbright Amendment and it may be misleading to say that Perkins was legislatively reversed since this implies that the legal right reasoning which it followed was overturned also and that is not true.

60. See, e.g., Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967); United States v. Gray Line Water Tours, 311 F.2d 779 (4th Cir. 1962); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968).

61. See, e.g., American Smelting & Refining Co. v. United States, 159 U.S. 75 (1922); United States v. New York & Porto Rico S.S. Co., 239 U.S. 88 (1915).

this premise it was reasoned that government bidding regulations inured to the benefit of the government[62] and that, if anyone were harmed by the violation of such regulations, it was the government rather than a prospective contractor.[63] Thus, the disappointed bidder could not sue as a private individual for a wrong suffered by the public.[64] He either lacked standing because the agency had merely exercised its statutory discretion to award the contract to a competitor[65] or, if the agency had indeed gone beyond the statutory limits of its discretion,[66] the losing bidder had suffered no legal wrong[67]—because the statutory provisions granting discretion to the agency were for the benefit of the government, not the bidder.[68]

Aside from these purely legal reasons for denying a bidder standing to sue, there are pragmatic considerations behind the refusal of the federal courts to review decisions of an administrative agency. First, courts have understandably been reluctant to impose their judgment upon an agency because they often lack the technical expertise necessary to comprehend the issues.[69] Second, an agency may need the power to make informal decisions, the reasons for which may be completely valid, but the explanation of which would entail considerable difficulty in a court of law.[70] Third, because the government's contracting business

62. E.g., Perkins v. Lukens Steel Co., 310 U.S. 113, 126 (1940); Friend v. Lee, 221 F.2d 96, 100 (D.C. Cir. 1955). Although Perkins became the leading case supporting this proposition it was not the first case involving a bidding question which used this rationale. See Colorado Paving Co. v. Murphy, 78 F. 28, 31-32 (8th Cir.), appeal dismissed, 166 U.S. 719 (1897).

63. "[I]f an award is made to a bidder whose bid was not 'most advantageous to the Government, price and other factors considered' . . . it is only the public who has a cause for complaint, and not an unsuccessful bidder." Heyer Prods. Co. v. United States, 140 F. Supp. 409, 412 (Ct. Cl. 1956), modified, 177 F. Supp. 251 (1959).

64. See Fulton Iron Co. v. Larson, 171 F.2d 994 (D.C. Cir. 1948), cert. denied, 336 U.S. 903 (1949) where the court said: "it is hornbook law that a mere member of the public cannot be heard to interfere with the processes of executive administration unless his specific, private right has been or is about to be invaded." Id. at 998.

65. Discretion can be broadly interpreted. See United States v. Thompson, 168 F. Supp. 281 (N.D.W. Va. 1958), aff'd, 268 F.2d 426 (4th Cir. 1959), where the West Virginia district court found that while the Small Defense Plant Administration certification that the plaintiff-contractor could do the job was conclusive, the contractor's low bid was not illegally rejected since the Navy had discretion to reject the bid on the basis that the contractor, although competent to do the job, lacked the necessary "tenacity or perseverence" to do it correctly. Id. at 289.

66. See notes 42-43 supra and accompanying text.

67. Cf. Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961), where the court held that the plaintiff, who had been barred from bidding because the Comptroller General had placed it on a list of contractors prohibited from competing for government contracts, had standing to sue since it had suffered injury individually and it was not the public which was injured. The plaintiff thus suffered a "legal wrong" and was entitled to judicial review under Section 10 of the Administrative Procedure Act. Id. at 370-71.

68. See notes 43-44 & 61-64 supra and accompanying text.

69. See Saferstein, supra note 24, at 382.

70. Id. at 387-88.

is of such magnitude[71] they envision a flood of suits resulting in congestion of the courts.[72] Finally, judicial review of agency decisions necessitating a delay of construction pending adjudication would be harmful in important government projects.[73] These objections to granting review were voiced in *Lind v. Staats*,[74] where, in dismissing a bidder's petition to enjoin a contract award to a competitor, the court said:

> The relief sought by plaintiffs creates great policy problems and brings into play the distinctions between powers of government. It does not require much imagination to anticipate the chaos which would be caused if the bidding procedure under every government contract was subject to review by court to ascertain if it was fairly and properly done, and the corresponding damage and delay which would be done to government business if the injunctive power of the court was used to stay contractual activities pending judicial decision.[75]

V. Indications Of Change

A. *Early Indications*

The first federal decision granting a bidder standing was the case of *Heyer Products Co. v. United States*.[76] In *Heyer*, the Court of Claims held that the plaintiff, who had alleged that the government had acted in bad faith "throughout the entire transaction"[77] in which his low bid was rejected, had standing to sue to recover the costs of preparing its bid since in advertising for bids the government impliedly promised to consider all bids fairly. Thus plaintiff could recover if he could prove that his bid had not been honestly considered.[78] Although standing to challenge the award of the contract was denied,[79] this limited judicial intrusion into the domain of agency action caused the case to be widely noted.[80] Indeed, one writer remarked that the decision might "deter government contracting officers from honestly refusing low bids on grounds which would be difficult to justify in court, such as a suspicion as to the bidder's reliability."[81]

71. "Federal procurements are ever increasing as a consequence of the increased budgets and expenditures for national defense and space projects, which affect virtually every business, directly or indirectly." J. Paul, supra note 8, at 1.

72. See 36 Neb. L. Rev. 612, 617 (1957); 44 Yale L.J. 149, 152 (1934). See also Saferstein, supra note 24, at 392-93.

73. See Saferstein, supra note 24, at 390-91. See also 44 Yale L.J. 149, 152 (1934).

74. 289 F. Supp. 182 (N.D. Cal. 1968).

75. Id. at 186.

76. 140 F. Supp. 409 (Ct. Cl. 1956).

77. Id. at 410.

78. "It was an implied condition of the request for offers that each of them would be honestly considered, and that that offer which in the honest opinion of the contracting officer was most advantageous to the Government would be accepted. No person would have bid at all if he had known that 'the cards were stacked against him.'" Id. at 412.

79. "The advertisement for bids was, of course, a request for offers to supply the things the Ordinance Department wanted. It could accept or reject an offer as it pleased, and no contract resulted until an offer was accepted. Hence, an unsuccessful bidder cannot recover the profit he would have made out of the contract, because he had no contract." Id.

80. See 56 Colum. L. Rev. 1239 (1956); 70 Harv. L. Rev. 564 (1957); 41 Minn. L. Rev. 373 (1957); 36 Neb. L. Rev. 612 (1957); 11 Sw. L. Rev. 521 (1957); 105 U. Pa. L. Rev. 756 (1957).

81. 70 Harv. L. Rev. at 565. Another writer commented that the decision implied the

The ultimate disposition of the *Heyer* case[82] and the fate of those bidders who sought to gain standing under its holding[83] indicate that the courts shared this concern[84] and have made the *Heyer* case in retrospect more abberational than trendsetting.

After the *Heyer* decision the federal courts reverted to the rigid rule denying standing to a bidder.[85] In recent years, however, several cases have indicated that a change might be made in this rule which had seemingly been "settled beyond controversy."[86] In *United States v. Gray Line Water Tours*,[87] decided in 1962, the Court of Appeals for the Fourth Circuit upheld a district court injunction against the Gray Line prohibiting it from carrying passengers to the Fort Sumter National Monument. Gray Line had alleged that the grant of the concession to a competitor was invalid because "it was awarded in an arbitrary, capricious and unjust fashion whereby Gray Line was robbed of a fair opportunity to obtain it."[88] The court, relying upon the *Perkins* decision, held that Gray Line had no standing to attack the contract award.[89] The court then, however, went on to refute the plaintiff's allegation of unfair dealing.[90] This

recognition of a right to the award of a government contract: "The court here has suggested that plaintiff, who claims to be the lowest responsible bidder, is entitled to his bid-preparation expenses as a result of the Government's breach. It would seem that the only possible basis for awarding such damages would be that the lowest responsible bidder has some right to the award of the contract. If he had no such right he could have suffered only nominal damages in not having his bid fairly considered." He expressed concern that the recognition of such a right "would severely limit the recognized discretionary area of the purchasing authority and would seem contrary to settled judicial practice." 56 Colum. L. Rev. at 1240, 1241 (footnotes omitted).

82. Heyer Prods. Co. v. United States, 177 F. Supp. 251 (Ct. Cl. 1959). After hearing the merits of the case the court dismissed the plaintiff's petition stating: "we cannot say that the rejection of plaintiff's bid was arbitrary or capricious or lacking in good faith." Id. at 257.

83. See Robert F. Simmons & Associates v. United States, 360 F.2d 962 (Ct. Cl. 1966) where plaintiff sought to recover bid preparation costs under the Heyer ruling when the General Services Administration decided to reject all bids and the court of claims found for the government. See also Trans. Int'l Airlines, Inc. v. United States, 351 F.2d 1001 (Ct. Cl. 1965) where plaintiff, who was originally awarded the contract after the successful bidder's was cancelled, sued for standby and maintenance costs. The court in finding for the government distinguished Heyer saying that in this case there was neither bad faith nor arbitrariness in the original award.

84. The federal courts have always feared that allowing a bidder standing to challenge the award of a contract would lead to delay in vital government projects and to congestion of the courts with suits by disgruntled bidders. For a recent case expressing such fear see Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968) discussed supra notes 74-75 and accompanying text.

85. See, e.g., Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967); Robert F. Simmons & Associates v. United States Dep't of Interior, 360 F.2d 962 (Ct. Cl. 1966); Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968); Robert Hawthorne, Inc. v. Department of Interior, 160 F. Supp. 417 (W.D. Pa. 1958).

86. Heyer Prods. Co. v. United States, 140 F. Supp. 409, 412 (Ct. Cl. 1956).

87. 311 F.2d 779 (4th Cir. 1962).

88. Id. at 781-82.

89. Id. at 782.

90. Id. In bidding cases the court, while denying standing, often discusses the merits of

gratuitious reply to the plaintiff's charges[91] raises the question whether the court would have granted the plaintiff standing, if it were not possible to answer its allegations.[92]

In *American Electric Co. v. United States*,[93] decided in 1967, the low bidder lost the award of the government contract when the Size Appeals Board of the Small Business Administration determined that it was not a small business concern. On appeal to the district court, plaintiff sought to enjoin the award of the contract to a higher bidder. The court, while finding that "[a]s a general rule, a disappointed bidder has no legal right to the award of a contract, even if he happens to be the lowest bidder. . . . because bidding is instituted solely for the benefit of the government,"[94] nevertheless, held that the court had jurisdiction to review the determination of the size of the plaintiff's business by the SBA.[95] However, since the court did not find that the SBA determination was erroneous and arbitrary as a matter of law it did not reach the issue of whether or not to grant the injunction.[96]

The *Heyer, Gray Line* and *American Electric* cases indicate that the federal courts have not been completely satisfied with the rule denying standing. In *Heyer* the court granted a limited form of standing to a bidder who alleged unfairness on the part of the government agency. The *Gray Line* court, although denying standing on the usual "legal right" grounds, still found it necessary to refute the plaintiff's claims of unfair dealing on the part of the government. In the *American Electric* case the court exercised jurisdiction on a parallel issue but, since it never got past that issue, it did not consider the standing question. Although other decisions handed down at the same time as these indicated no change in the standing rule for bidders,[97] these cases demonstrate the concern of some federal courts about the rigidity of the rule and the potential injustice it may cause.

B. *Recent Federal Decisions*

In 1969, the Federal Aviation Administration awarded a contract, on the basis

the case. This can only be explained by the peculiar nature of the standing issue which while supposedly a jurisdictional issue preliminary to a discussion of the merits often requires a consideration of the merits before it can be decided. See generally Barlow v. Collins, 397 U.S. 159, 175-76 (1970) (Brennan, J., concurring).

91. The refutation is prefaced by the statement that the appellant's lack of standing disposes of the issue, "[b]ut because the appellant has so strenuously pressed the charge of unfair dealing with it, we relate the facts of record and these refute the accusation." 311 F.2d at 782.

92. One writer commented that a court in stating several reasons to dismiss a bidding case, any one of which would be sufficient to dismiss, might wish to show its intent "to close all avenues for such unwelcome suits in the future." 44 Yale L.J. 149, 152 (1934).

93. 270 F. Supp. 689 (D. Hawaii 1967).

94. Id. at 690.

95. Id.

96. Id. at 691.

97. See, e.g., Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967); Robert F. Simmons & Associates v. United States, 360 F.2d 962 (Ct. Cl. 1966). But see Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968) where, despite holding that the bidder lacked standing, the court found it necessary to balance the injury to the plaintiffs against possible harm to the government project caused by delay in the courts. Id. at 186.

of competitive bidding, for instrument landing systems to Airborne Instrument Laboratory, a competitor of Scanwell Laboratories Incorporated. Although Airborne was the low bidder, Scanwell challenged the award on the ground that Airborne's bid was non-responsive to the FAA's invitation for bids and, therefore, the FAA, in awarding the contract to a non-responsive bidder, had acted arbitrarily, capriciously, and in violation of the statutory provisions governing the award of contracts.[98] Scanwell petitioned the federal court to set aside the award of the contract basing its claim of standing on section 10 of the Administrative Procedure Act.[99]

The Administrative Procedure Act (APA) was passed in 1946.[100] The judicial review provisions of this act apply to most government agencies.[101] Section 10 of this act provides: "A person suffering legal wrong because of agency action . . . within the meaning of a relevant statute, is entitled to judicial review thereof."[102] There has been some controversy concerning the meaning of this statute. The statute, while not using the phrase "injury in fact," seems to support that doctrine when it says, "adversely affected or aggrieved," and it has been argued that the act codified the "injury in fact" doctrine.[103] On the other hand, it has been contended that this section merely stated the existing law[104]—that is, the "legal right" doctrine.[105] In interpreting the act, a number of cases have accepted the latter view.[106] In cases involving a bidder's challenge of a government contract award, where the APA has been mentioned at all, it has been held not to change the rule that a bidder must have suffered injury to a legal right in order to have standing.[107] Thus when Scanwell brought its action, it could be

98. See 41 C.F.R. § 1-2.301(a) (1970); 41 C.F.R. § 1-2.404-2(a) (1970).

99. 5 U.S.C. § 702 (Supp. V, 1970).

100. Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended 5 U.S.C. §§ 550-59, 701-06 (Supp. V, 1970).

101. The agencies excepted are listed in 5 U.S.C. § 701 (Supp. V, 1970).

102. 5 U.S.C. § 702 (Supp. V, 1970). This section is modified by § 701(a) (Supp. V, 1970) which provides: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

103. See 3 K. Davis, supra note 4, at 211-12.

104. See Jaffe, supra note 24, at 528-31. At the time of the passage of the APA the Attorney General testified to Congress that the act reflected existing law. S. Doc. No. 248, 79th Cong., 2d Sess. 310 (1946). See also 104 U. Pa. L. Rev. 843, 857 (1956).

105. See notes 31-33 supra and accompanying text. While there had been some modification of the basic "legal right" doctrine in the federal courts (see note 32 supra), the doctrine was fundamentally unchanged as of 1946 when the APA was enacted.

106. Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450, 465 (1970). Even Professor Davis admits that the courts have for the most part rejected his interpretation that the APA codified the injury in fact doctrine, and followed the leading case, Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955). See Jaffe, supra note 24, at 528. But see American President Lines Ltd. v. FMB, 112 F. Supp. 346 (D.D.C. 1953).

107. In Clement Martin, Inc. v. Dick Corp., 97 F. Supp. 961 (W.D. Pa. 1951) the district court stated: "The Administrative Procedure Act did not create rights but confers jurisdiction to review discretionary acts of agencies which affected existing statutory rights." Id. at 964. The court also said that although the plaintiff might show that it had suffered "grievous

said that most federal courts would have regarded violation of a legal right as a prerequisite to standing under the APA.

In *Scanwell Laboratories, Inc. v. Shaffer*,[108] the Court of Appeals for the District of Columbia reversed the district court order dismissing Scanwell's complaint for lack of jurisdiction. The court found that the appellant had standing as a "person aggrieved" under the APA, and that infringement of a "legal right"[109] was not required for the purposes of standing.[110] Relying mainly on *FCC v. Sanders Brothers Radio Station*[111] and *Associated Industries Inc. v. Ickes*[112] to show that the legal right doctrine was no longer controlling in the federal courts,[113] Judge Tamm reasoned that under section 10 of the APA the appellant had standing to attach the award to Airborne.[114] Curiously,[115] the *Scanwell* opinion, in its discussion of the standing issue, cited only two cases which relate directly to judicial review being sought by a bidder. One was the *Perkins* case,[116] which *Scanwell* dismissed as having been legislatively reversed in 1952.[117] The *Scanwell* court also found *Perkins* unreliable since it was "decided during the heyday of the legal right doctrine, and before the passage of the Administrative Procedure Act."[118] The other bidding case which the court discussed was *Friend v. Lee*.[119] In *Friend* the operator of an automobile rental service challenged the grant of a government concession to his competitor after both had submitted bids for the contract. In a decision by the same court which fifteen years later

harm" and that it was an aggrieved party but that: "[I]t is clear that the Surgeon General and the Secretary of Welfare had no contractual relations with plaintiff nor did they inflict any legal wrongs upon or cause it to be adversely affected or aggrieved by any action on their part within the meaning of any relevant statute under which the Administrative Procedure Act might be invoked." Id. (emphasis deleted).

108. 424 F.2d 859 (D.C. Cir. 1970).

109. See discussion in notes 31-33 supra.

110. 424 F.2d at 869.

111. 309 U.S. 470 (1940). Standing was granted to the plaintiff to challenge the award of a license to a competitor. The Court interpreted § 402(b)(2) of the Communications Act of 1934 to mean that Congress meant standing to be given a competitor to challenge the grant of a license because he would be the only person who would challenge an erroneous FCC ruling. Incredibly Sanders was not mentioned in any bidder challenge case after 1940 despite the obvious analogy which could have been made.

112. 134 F.2d 694 (2d Cir.), vacated per curiam as moot, 320 U.S. 707 (1943). The Associated Industries case emphasized the plaintiff's role as a private Attorney General in those cases where he seeks to prevent a government officer from abusing his power. 134 F.2d at 704.

113. 424 F.2d at 863.

114. Id. at 869.

115. Perhaps the Scanwell court was acting under the ancient theory that the best way to treat adverse precedent is to ignore it. At any rate, in Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955) the same court cited many cases which had denied a bidder standing to sue and then adopted their reasoning. Id. at 100.

116. See notes 49-61 supra and accompanying text.

117. 424 F.2d at 867. Here the court was in agreement with Professor Davis. See note 4 supra.

118. Id. at 866.

119. 221 F.2d 96 (D.C. Cir. 1955).

was to decide *Scanwell* it was held that Friend lacked standing to sue as a bidder since, although he had alleged that the government had violated a statute in granting his competitor the contract,[120] such statutes were enacted for the benefit of the government and conferred no rights upon those who dealt with it.[121] The court cited the *Perkins* case in support of this proposition.[122]

Judge Tamm attempted to distinguish the *Friend* decision from *Scanwell*,[123] but the distinction is not convincing. In *Friend*, argued Judge Tamm, the plaintiff failed to allege arbitrary and capricious misconduct on the part of the government.[124] Yet the allegation in *Friend* was that the government had violated a statute relating to advertising for bids[125] and the allegation in *Scanwell* was that the government had violated a regulation in awarding a contract to a nonresponsive bidder.[126] *Friend* cited *Perkins* and found that the statute did not protect a bidder,[127] while *Scanwell* found such a violation constituted arbitrary action on the part of the government agency and permitted a bidder to sue under section 10 of the APA.[128] *Friend* found *Perkins* to be good authority in 1955,[129] but *Scanwell* contended *Perkins* was legislatively reversed in 1952 and examined the legislative history of the Fulbright Amendment to prove it.[130] Finally, Judge Tamm quoted *Friend* in positing that where "there is a prima facie showing of arbitrariness on the part of Government officials in regulatory action taken by them, sufficient to threaten substantial injury to the party affected, the injured party is entitled to be heard."[131] This quotation, while seeming to commit the court to the "injury in fact" doctrine,[132] did not refer to the central issue of the bidder's right to challenge the contract award, but only to the collateral issue in *Friend* which was the government's "unreasonable restrictions" upon the plaintiff's business.[133] The thrust of the *Friend* decision is that a bidder lacks standing to challenge the award of a government contract to a competitor,[134] whereas in *Scanwell* standing was granted on substantially similar facts. Thus, in spite of the distinction Judge Tamm attempted to make, the *Scanwell* and *Friend* decisions are irreconcilable and *Scanwell* overrules *Friend*.

Scanwell indicates that one who makes a prima facie showing of arbitrary or capricious abuse of discretion on the part of a government agency has standing

120. 41 U.S.C. § 5 (1964) (regarding advertising for bids).
121. 221 F.2d at 100.
122. Id.
123. 424 F.2d at 868-69.
124. Id. at 869 n.10.
125. 221 F.2d at 100.
126. 424 F.2d at 860-61.
127. 221 F.2d at 100.
128. 424 F.2d at 869.
129. 221 F.2d at 100.
130. 424 F.2d at 867. See notes 56-60 supra and accompanying text.
131. 221 F.2d at 102.
132. See notes 31-32 supra.
133. 221 F.2d at 100.
134. Friend has been cited by other bidding cases for this proposition. For a recent case denying standing to a bidder and relying on Perkins and Friend, see Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968).

to sue under section 10 of the APA.[135] Precisely what constitutes such a prima facie showing is left undetermined. It seems that the court advocated the granting of standing to anyone who can show he has suffered injury in fact[136] yet at the same time Judge Tamm stated that the final decision to grant standing must be within the discretion of the court.[137]

Additional support for the *Scanwell* case is found in two recent companion decisions of the Supreme Court. In *Association of Data Processing Service Organizations, Inc. v. Camp*,[138] and *Barlow v. Collins*[139] the Supreme Court set forth a three-fold test to determine whether the party seeking judicial review has standing to maintain the action. The basis, the Court maintained, for any test of standing is to determine whether a case or controversy exists.[140] This is done by determining whether the party seeking review has suffered injury in fact.[141] If the party can show injury in fact, he meets the first requirement. The party then must show that his interest is arguably within the sphere of interest to be protected by the statute which he alleges has been violated.[142]

In the *Data Processing* case, the petitioners sought to challenge a ruling by the Comptroller of the Currency permitting national banks to make data processing services available to other banks and bank customers. Petitioners alleged the loss of two customers to a national bank,[143] and the Court recognized this as a sufficient showing of injury in fact.[144] Furthermore, the Court found that the statute in question, which provided that: "No bank service corporation may engage in any activity other than the performance of bank services for banks,"[145] brought a competitor within its protection.[146] The Court justified this broad view of the interests protected by the statute, stating that: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."[147]

The final determination to be made is whether Congress has precluded judicial

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135. 424 F.2d at 869.

136. "If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity?" Id. at 866-67.

137. "Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted." Id. at 872.

138. 397 U.S. 150 (1970).

139. 397 U.S. 159 (1970).

140. 397 U.S. at 151, relying on the Court's decision in Flast v. Cohen, 392 U.S. 83 (1968). It is interesting to note that subsequent to the Flast decision a bidder attempted to gain standing to challenge a government contract award citing Flast and his status as a taxpayer. A federal district court found that Flast was not available to aid standing since the issue involved no constitutional implications. Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968).

141. 397 U.S. at 152.

142. Id. at 153.

143. Id. at 152.

144. Id.

145. 12 U.S.C. § 1864 (1964).

146. 397 U.S. at 156.

147. Id. at 154.

review of administrative actions in the particular area under discussion.[148] In light of past Supreme Court decisions a finding against review is highly unlikely unless Congress had made this very clear in the statute.[149] In *Data Processing* the Court found no such Congressional prohibition in the statute.[150]

The Court of Appeals for the District of Columbia cited the *Data Processing* and *Barlow* cases in *Ballerina Pen Company v. Kunzig*[151] as a basis for its three prerequisites for a party to challenge the award of a government contract:

> First, the party must allege that the challenged action has caused him injury in fact . . . . The plaintiff must further allege that the agency has acted arbitrarily, capriciously, or in excess of its statutory authority, so as to injure an interest that is "arguably within the zone or interests to be protected or regulated by the statute or constitutional guarantee in question" . . . . Finally, there must be no "clear and convincing" indication of a legislative intent to withhold judicial review.[152]

In *Ballerina*, the appellants alleged that the Committee on Purchases of Blind-Made Products had exceeded its statutory authority by including ball-point pens on the list of blind-made products to be purchased by the government which resulted in appellants' being unable to bid for the award of a government contract to supply ball-point pens. Employing the three part test described above, the Court found that Ballerina had standing.[153]

There is no doubt that the standards set in *Ballerina* and *Scanwell* are easier to meet than the "legal right" theory which was so often used to deny a bidder standing to challenge a government contract award.[154] The court in both cases, however, dismissed the idea that an easing of the standing rules would lead to a flood of frivolous suits by disgruntled bidders.[155] The court had occasion to meet the issue directly in *Blackhawk Heating & Plumbing Co. v. Driver*.[156] In *Blackhawk* the appellant had submitted the low bid for the construction of a Veterans Administration Hospital, but its bid was rejected by the contracting officer who determined that appellant was not a responsible prospective contractor. While reversing the decision of the lower court which had dismissed the complaint for lack of standing,[157] the court found that "the inquiry does not end with a determination that the plaintiff has standing."[158] The court then proposed a method of disposing of a frivolous suit after the plaintiff has gained standing by alleging arbitrary or capricious agency action:

> Rather than denying access to the courts to all litigants who make claims of arbitrary and capricious agency action on the ground that there will be unmeritorious suits from time to time—a process which also has the effect of barring plaintiffs who

148. Id. at 156-57.

149. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136 (1967), where standing to challenge the HEW Secretary's interpretation of an FDA ruling was upheld under a liberal reading of the APA favoring review.

150. 397 U.S. at 157.

151. No. 22,799 (D.C. Cir., April 24, 1970).

152. Id. at 7.

153. Id. at 26.

154. See notes 31-33 supra and cases cited note 46 supra.

155. 424 F.2d at 872; No. 22,799 at 10.

156. No. 22,956 (D.C. Cir., May 19, 1970).

157. Id. at 3.

158. Id. at 5.

have legitimate grievances—we have determined that considerations of standing have nothing to do with the merits of the controversy and that the summary judgment procedure contemplated by Rule 56 of the Federal Rules of Civil Procedure will serve admirably to eliminate the frivolous lawsuits which might occasionally arise.[159]

VI. Conclusion

The *Blackhawk, Ballerina* and *Scanwell* cases have pointed the federal courts in a new direction in cases where a disappointed bidder seeks judicial review. It is open to question whether the other circuits will, or, indeed, should follow the lead of the District of Columbia Circuit. Despite that court's contention that "the mere fact that a party has standing does not entitle him to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign"[160] it remains to be seen how many government contracts will be delayed in the courts because a losing bidder will allege arbitrary or capricious conduct on the part of the government agency and thereby force the government to muster evidence to gain a summary judgment—as suggested by the *Blackhawk* case—or, if the proceedings go past that stage, to the lengthy delay of a trial. In deciding whether or not to follow the District of Columbia Circuit's lead, the other federal jurisdictions must determine whether the opening of the courts to legitimate suits by bidders will be worth what it achieves in greater justice by exposing government unfairness and in preventing a waste of public funds; or whether any benefits from such a course would be outweighed by congestion of the courts with nuisance suits and the financial losses caused by resultant delays in important government projects.

Perhaps the best solution would be to follow the lead of the District of Columbia Circuit, and, if it becomes apparent that the courts are inundated with frivolous suits, an administrative ombudsman's office could be established to screen out frivolous suits and protect the judiciary from an onslaught of disappointed bidders.[161] Such a system may ultimately prove to be the only way to achieve justice while preserving the integrity of the courts. Certainly, a bidder whose bid has been rejected arbitrarily or capriciously by a government agency has suffered injury and the public at large may likewise have been injured. It is contrary to the philosophy of our system of justice to permit such a wrong to exist without any provision for a remedy.[162]

159. Id. at 16.

160. Id. at 5-6.

161. The need for an administrative ombudsman has been widely discussed in recent law review articles. See, e.g., D'Alemberte, The Ombudsman, A Grievance Man For Citizens, 18 U. Fla. L. Rev. 545 (1966); Davis, Ombudsman in America: Officers to Criticize Administrative Action, 109 U. Pa. L. Rev. 1057 (1961); McClellan, The Role of the Ombudsman, 23 U. Miami L. Rev. 463 (1969); The Ombudsman, 19 Ad. L. Rev. 7 (1966); Tibbles, Ombudsman: Who Needs Him? 47 J. Urban L. 1 (1969).

162. As Professor Davis, in his article proposing the establishment of an ombudsman's office in the United States—Ombudsman in America: Offices to Criticize Administrative Action, 109 U. Pa. L. Rev. 1057 (1961)—points out: "[T]he need for investigation of specific complaints . . . is greatest in that part of administration which is unprotected . . . by judicial review." Id. at 1072. If, therefore, the hearing of a bidder's complaints were to become too burdensome for the courts, an ombudsman might be a good solution. As the Professor states: "[A]n Ombudsman can protect against procedure which is excessively cumbersome, as neither the parties nor the courts can ordinarily do." Id. at 1075.